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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

HEATHER LEEANN HUTCHINSON,

Defendant and Appellant.

F078063

(Super. Ct. No. F10900882)

OPINION

THE COURT[*]

APPEAL from an order of the Superior Court of Fresno County. Don Penner, Judge.

Allan E. Junker, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Catherine Chatman and Harry Joseph Colombo, Deputy Attorneys General, for Plaintiff and Respondent.

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[*] Before Levy, Acting P.J., Peña, J. and DeSantos, J.

INTRODUCTION

Appellant Heather Leeann Hutchinson pled no contest on September 20, 2010, to one count of unauthorized use of personal identifying information of another person in violation of Penal Code[1] section 530.5, subdivision (a). Subsequently, on July 19, 2018, Hutchinson filed an application pursuant to section 1170.18 to reduce her conviction to a misdemeanor. The superior court denied the application on the basis the conviction was for an offense that was not eligible. We affirm.

FACTUAL AND PROCEDURAL SUMMARY

On June 20, 2009, Hutchinson and a codefendant fraudulently used the victim's credit cards and bank account information to make purchases at several businesses locally and on the Internet. The probation report states that the victim's credit card was used to purchase $953.49 of goods online and $234.70 worth of goods in local stores. Other losses were noted, but no dollar amounts specified.

Hutchinson was captured on video using the victim's credit card. When questioned, she admitted to making several purchases using the victim's accounts "to generate money for drugs." Hutchinson reported there were several stolen items in the motel room in which she was staying with her boyfriend, including a computer.

A forensic examination of the computer disclosed personal and account information pertaining to the victim and others. The computer also contained information regarding the purchases made online using the victim's credit card.

A complaint was filed on March 5, 2010, in the Fresno County Superior Court charging Hutchinson with eight counts of unauthorized use of personal identifying information of another person; seven counts of second degree burglary; possessing the personal identifying information of ten or more people with the intent to defraud in

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[1] References to code sections are to the Penal Code unless otherwise specified.

violation of section 530.5, subdivision (c)(3); and possession of known stolen property.

On September 20, 2010, pursuant to a plea agreement, Hutchinson pled no contest to one count of violating section 530.5, subdivision (a), unauthorized use of personal identifying information of another person. She pled to a felony violation of section 530.5, subdivision (a). The other charges were dismissed on motion of the People.

At the January 20, 2011 sentencing, the superior court stated on the record that it had read and considered the probation officer's report and asked the parties if there were any additions, deletions, or corrections to the report. The parties responded that there were none.

The People asked for sentencing to conform to the plea agreement; Hutchinson submitted on the probation report and recommendation. The superior court placed Hutchinson on five years' formal probation and ordered her to serve 365 days in local custody, with credit for 27 days.

On September 12, 2012, the probation officer filed to revoke probation. Hutchinson had tested positive for methamphetamine on multiple occasions and had failed to maintain contact with the probation officer, who had made multiple attempts at contact. The superior court revoked probation and issued a no-bail bench warrant.

On October 21, 2013, Hutchinson admitted the violation of probation, was reinstated on probation, and ordered to serve the balance of the 365-day local custody time originally imposed.

On July 19, 2018, Hutchinson filed an application pursuant to section 1170.18 to have her felony conviction reduced to a misdemeanor. The application alleged that her conviction was eligible for reduction to a misdemeanor pursuant to Proposition 47. No supporting documentation was attached to the application.

On August 13, 2018, the superior court issued an order denying the application on the grounds the conviction was not eligible for reduction to a misdemeanor. The order also notes that relief previously was denied on November 6, 2015.

Hutchinson filed a timely appeal of the denial of her application on September 10, 2018.

DISCUSSION

The sole issue on appeal is whether a felony violation of section 530.5, subdivision (a) for unauthorized use of personal identifying information of another person is eligible for reduction to a misdemeanor after Proposition 47. We conclude it is not and the superior court did not err in denying Hutchinson's application.

Summary of Proposition 47

"Proposition 47 was passed by voters at the November 4, 2014, General Election, and took effect the following day. The measure's stated purpose was 'to ensure that prison spending is focused on violent and serious offenses, to maximize alternatives for nonserious, nonviolent crime, and to invest the savings generated from this act into prevention and support programs in K–12 schools, victim services, and mental health and drug treatment,' while also ensuring 'that sentences for people convicted of dangerous crimes like rape, murder, and child molestation are not changed.' (Voter Information Guide, Gen. Elec. (Nov. 4, 2014) text of Prop. 47, § 2, p. 70 (Voter Information Guide).) To these ends, Proposition 47 redefined several common theft- and drug-related felonies as either misdemeanors or felonies, depending on the offender's criminal history. The redefined offenses include: shoplifting of property worth $950 or less (Pen. Code, § 459.5, subd. (a)); forgery of instruments worth $950 or less (Pen. Code, § 473, subd. (b)); fraud involving financial instruments worth $950 or less (Pen. Code, § 476a, subd. (b)); theft of, or receiving, property worth $950 or less (Pen. Code, §§ 490.2, subd. (a), 496, subd. (a)); petty theft with a prior theft-related conviction (Pen. Code,

§ 666, subd. (a)); and possession of a controlled substance (Health & Saf. Code, §§ 11350, subd. (a), 11377, subd. (a)).” (*People v. DeHoyos* (2018) 4 Cal.5th 594, 597–598; accord, *People v. Martinez* (2018) 4 Cal.5th 647, 651–652 (*Martinez*).)

Proposition 47 provided for prospective changes to the law and for retrospective relief in the form of a petitioning process for those convicted and serving final sentences, or those who completed their sentences prior to the measure’s passage. (§ 1170.18, subds. (a), (f); *People v. DeHoyos*, *supra*, 4 Cal.5th at pp. 597–598; *Martinez*, *supra*, 4 Cal.5th at p. 651.)

Section 530.5

“In order to violate section 530.5, subdivision (a), a defendant must both (1) obtain personal identifying information, and (2) use that information for an unlawful purpose. [Citation.] Thus, it is the use of the identifying information for an unlawful purpose that completes the crime and each separate use constitutes a new crime.” (*People v. Mitchell* (2008) 164 Cal.App.4th 442, 455.) The “purpose of section 530.5, subdivision (a) is to criminalize the willful use of another’s personal identifying information, … regardless of whether any actual harm or loss is caused.” (*People v. Johnson* (2012) 209 Cal.App.4th 800, 818 (*Johnson*).)

Actual injury or loss is not an element of the offense described in section 530.5, subdivision (a). “ ‘It is not necessary that anyone actually be defrauded or actually suffer a financial, legal, or property loss as a result of the defendant’s acts.’ ” (*Johnson*, *supra*, 209 Cal.App.4th at p. 818, citing CALCRIM No. 2040.)

Proposition 47 and Section 530.5

The offense in this case was committed prior to the enactment of Proposition 47. Hutchinson pled no contest to unauthorized use of personal identifying information of another under section 530.5, subdivision (a), which is not one of the offenses specifically reduced to a misdemeanor under Proposition 47.

The interpretation of a voter initiative relies on "the same principles governing statutory construction. We first consider the initiative's language, giving the words their ordinary meaning and construing this language in the context of the statute and initiative as a whole. If the language is not ambiguous, we presume the voters intended the meaning apparent from that language, and we may not add to the statute or rewrite it to conform to some assumed intent not apparent from that language. If the language is ambiguous, courts may consider ballot summaries and arguments in determining the voters' intent and understanding of a ballot measure." (*People v. Superior Court* (*Pearson*) (2010) 48 Cal.4th 564, 571; accord, *People v. Valencia* (2017) 3 Cal.5th 347, 357; *People v. Bunyard* (2017) 9 Cal.App.5th 1237, 1243.) "[V]oters who approve an initiative are [generally] presumed to ' "have voted intelligently upon an amendment to their organic law, the whole text of which was supplied [to] each of them prior to the election and which they must be assumed to have duly considered …." ' " (*Valencia, supra,* at p. 369.) We also generally presume "voters, in adopting an initiative, did so being 'aware of existing laws at the time the initiative was enacted.' " (*Valencia, supra,* at p. 369; accord, *People v. Adelmann* (2018) 4 Cal.5th 1071, 1080; *Martinez, supra,* 4 Cal.5th at p. 653; *People v. Bunyard, supra,* at p. 1243.)

The California Supreme Court has interpreted section 490.2, petty theft, in determining whether Proposition 47 applies to vehicle theft under Vehicle Code section 10851 (*People v. Page* (2017) 3 Cal.5th 1175, 1183–1184), and theft of access card account information under section 484e (*People v. Romanowski* (2017) 2 Cal.5th 903, 907–909). While the California Supreme Court has rejected reliance on a section's express inclusion, or lack of inclusion, as determinative of whether Proposition 47 applies (*Martinez, supra,* 4 Cal.5th at p. 652; *Page, supra,* at pp. 1184–1185), it concluded that based on the plain language of section 490.2, vehicle theft and theft of access card

account information, as crimes of theft, are included within the scope of section 490.2 (*Page*, *supra*, at p. 1183; *Romanowski*, *supra*, at pp. 912–913).

In *People v. Soto* (2018) 23 Cal.App.5th 813, the Court of Appeal rejected the argument that Proposition 47 applied to the defendant's conviction for theft from an elder under section 368, former subdivision (d). (*Soto*, *supra*, at pp. 822–823.) The appellate court cautioned against an over-expansive reading of *Romanowski* and *Page* and explained, "*Romanowski* and *Page* consider whether stealing a particular type of property (access card information or a vehicle) could constitute petty theft. Both cases involve crimes that were previously *classified* as grand theft. Thus, neither had occasion to consider Proposition 47 eligibility for what we will call a pure 'theft-plus' offense, i.e., one that is not identified as grand theft and requires *additional necessary elements* beyond the theft itself. Nothing in *Romanowski* or *Page* suggests that section 490.2 extends to any course of conduct that happens to include obtaining property by theft worth less than $950." (*Soto*, *supra*, at p. 822.)

Consistent with this reasoning, one appellate court recently held that Proposition 47 does not apply to convictions under section 530.5, subdivision (a), for unauthorized use of personal identifying information. (*People v. Sanders* (2018) 22 Cal.App.5th 397, 406, review granted July 25, 2018, S248775; contra, *People v. Jimenez* (2018) 22 Cal.App.5th 1282, 1291–1292, review granted July 25, 2018, S249397.) The *Sanders* court reasoned that although the crime is commonly known as "identify theft" (*People v. Sanders*, *supra*, at p. 405), it is not a theft offense but instead "seeks to protect the victim from the misuse of his or her identity" (*ibid.*; contra, *People v. Jimenez*, *supra*, at p. 1292).

The appellate court in *People v. Liu* (2018) 21 Cal.App.5th 143, 153, review granted on other grounds June 13, 2018, S248130, addressed section 530.5, subdivision (c) and concluded it was a nontheft offense. Unlike other offenses that fall

within Proposition 47 and section 490.2, section 530.5 "is not defined as grand theft and does not proscribe 'obtaining property by theft.' " (*Liu*, at p. 152.)

The appellate court in *People v. Weir* (2019) 33 Cal.App.5th 868 (*Weir*), reached the same conclusion as *Sanders* and expressed agreement with *Liu* that section 530.5 describes a nontheft offense. (*Weir*, at p. 880.) The *Weir* court noted that Proposition 47 added section 473, subdivision (b) to allow misdemeanor treatment of a forgery offense, with the qualifier that this "subdivision shall be not be applicable to any person who is convicted of both forgery and identify theft, as defined in Section 530.5." (*Weir*, at p. 881.)

Conclusion

Prior to Proposition 47, offenses under section 530.5 were not classified as theft offenses because the "purpose of section 530.5, subdivision (a) is to criminalize the willful use of another's personal identifying information, … regardless of whether any actual harm or loss is caused." (*Johnson*, *supra*, 209 Cal.App.4th at p. 818.) Actual injury or loss is not an element of the offense described in section 530.5, subdivision (a) and the amount of loss Hutchinson caused to the victim is irrelevant. " 'It is not necessary that anyone actually be defrauded or actually suffer a financial, legal, or property loss' " in order to constitute a violation of section 530.5. (*Johnson*, at p. 818.)

When violations of section 530.5 do not require any financial loss to the victim; have historically been classified as nontheft offenses; and pursuant to section 473, subdivision (b) those who otherwise would have their forgery offense treated as a misdemeanor are excluded from Proposition 47 treatment if they also violated section 530.5; we conclude that convictions for violating section 530.5 are not eligible for reduction to a misdemeanor pursuant to Proposition 47 and section 1170.18. (*Weir*, *supra*, 33 Cal.App.5th at pp. 880–881.)

Because the amount of loss is not an element of a violation of section 530.5, and violations of section 530.5 are otherwise ineligible for reduction to a misdemeanor under section 1170.18 and Proposition 47, we need not address Hutchinson's request that she be afforded an opportunity to prove the victim suffered less than $950 in losses as a result of her criminal conduct.

DISPOSITION

The August 13, 2018 order denying Hutchinson's application for reduction of her felony conviction to a misdemeanor is affirmed.